Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In re	:	
Review of the Prime Time Access Rule,	:	MM Docket No. 94-123
Section 73.658(k)	:	
of the Commission's Rules	:	

COMMENTS OF KING WORLD PRODUCTIONS, INC.

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SUMMARY OF ARGUMENT

The prime time access rule has succeeded extraordinarily well in fulfilling the purposes for which the FCC created the rule. The rule has proved vitally important to the success of independent television stations. Were the rule to be repealed, the access period ratings of independent stations would plummet by 60 percent (67 percent if one includes the access period and the hour immediately following it).

Network affiliates now offer a diversity of programming that was almost entirely unavailable before the advent of the rule. There is no indication that this would remain true were the rule repealed.

The rule has had ancillary benefits as well. The apparent oligopoly power of the networks in the sale of national video advertising time has been constrained by competition created by PTAR. The market for local video advertising has benefited from the rule as well.

All of this has been accomplished at remarkably small cost. PTAR imposes a minimal regulatory burden on the networks; it theoretically applies to only seven of the 28 weekly prime time hours and, in practice, to less time than this.

The prime time access rule should not be rescinded or amended.

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King World Productions, Inc. ("King World") submits these comments in response to the Notice of Proposed Rulemaking released in this proceeding on October 25, 1994, 9 F.C.C. Rcd 6328 (the "NPRM").[1/] As the Commission is well aware, King World has a vital interest in this proceeding; it is one of the entities that has benefited from the remarkable resurgence of the market for first-run syndicated programs broadcast in prime time as a result of the prime time access rule, 47 CFR § 73.658(K) ("PTAR").[2/]

The NPRM may be right in observing that the F.C.C. has an obligation to re-examine the efficacy of its regulations periodically:

> Inherent in our regulatory mandate is the continuing responsibility to review our rules and policies to determine whether, in light of prevailing market conditions, such rules and policies continue to serve the public interest.

1/ The initial schedule for filing comments was extended by an order released on December 8, 1994, F.C.C. 94-1408.

2/ The NPRM several times uses King World and/or the programs that it produces and/or syndicates as examples of the way that the first-run syndication sector works. See, e.g., NPRM, 9 F.C.C. Rcd. at 6331 (paragraph 6), 6349 (paragraph 34).

NPRM, 9 F.C.C. Rcd. at 6330; c.f. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) (Bechtel II).[3/] Nevertheless, even the very rigorous review of the Network Inquiry staff, concluded in 1980, conceded that PTAR had succeeded in its objectives, at least in part:

> Since at the time of [the Network Inquiry] study there were still only three major purchasers of network programming, the staff was unable to conclude that PTAR reduced "network dominance" in the sense of increasing the number of outlets or viewing options available to the public. It did, however, find that the rule by its very promulgation curbed "network dominance" by mandating a reduction in the networks' prime time schedules and requiring affiliates to obtain a portion of their prime time programming from non-network sources.

NPRM, 9 F.C.C. Rcd. at 6336. The first conclusion of the Network Inquiry staff recited above (whether right or wrong in 1980) is certainly incorrect today. There is now a fourth major purchaser of network programming. And, as the NPRM notes, more "emerging" networks (both Warner Brothers and United Paramount have begun network-like operation) are in prospect. NPRM, 9 F.C.C.Rcd. at 6337-38. Moreover, the total number of viewing options available today has increased substantially through the proliferation of independent stations, which have, in turn, provided the launching platforms for those emerging networks. Much of this is attributable to PTAR. Put another way, were PTAR to be repealed, the number of independent outlets would dwindle, the prospects for the development of new networks would vanish and the

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3/ The status of the rule under examination here is vastly different from that at issue in the protracted Bechtel litigation in one fundamental sense. In Bechtel II, the court noted that "the Commission appears to have *no* evidence that the preferred structure even survives among the winners, much less that it does so among especially outstanding broadcasters." Id., 10 F.3d at 887. There is, in contrast, ample evidence that PTAR has worked.

availability of network-quality first-run syndicated programs in prime time would inexorably diminish toward the dearth of supply that moved the Commission to adopt PTAR in 1970.

In short, PTAR has worked. The NPRM recognizes this, albeit somewhat grudgingly, in noting that it is not the past success of PTAR, but the continuing necessity of a regulation that has worked extraordinarily well, that mandates review:

> In 1970, there was a strong case for taking government action to correct the effects of a competitively unbalanced market. However, with the development of alternative forms of video distribution, the growth of the broadcast industry (including increased competition among networks for affiliates), and the increase in the number and type of entities creating nationally distributed video programming, we must assess the continued efficacy of a rule like PTAR.

NPRM, 9 F.C.C. Rcd. at 6348.

The factual premises of this statement are, in our view, wrong. To paraphrase the vernacular, one is cautioned not to seek to repair that which is not broken. There is regulatory sense in this common wisdom. When a regulation has accomplished much of what it set out to achieve, one must be alert to the high likelihood for harm if that rule is abandoned. That is not to say that every rule that has enjoyed some success should be guaranteed a perpetual existence. There are costs to rules that must, at any given time, be exceeded by attendant benefits. The relationship between these regulatory costs and benefits can change over time, as the NPRM recognizes, and it is wise to measure that relationship periodically to be sure that the proper cost-benefit relationship continues to obtain.

One obviously must correctly gauge costs and benefits to accomplish reasonable conclusions in such an inquiry. We believe, and demonstrate, that the NPRM is wrong both in its measure of the costs of the continuation of PTAR (these are overstated) and the benefits that are achieved by the rule (these are understated). The cost analysis intended by the NPRM is focused on the extent to which continuation of the rule results in dysfunctions in a market for private goods. Proper economic analysis must instead treat programming disseminated by broadcast facilities as public goods, which requires significantly different cost (and, for that matter, benefit) analysis. In fashions that are in some ways closely aligned with that observation and in other ways that have completely independent analytic integrity, the benefits of PTAR are not properly appreciated by the NPRM. As we will show, the proliferation of independent outlets for the delivery of video programming[4/] that has resulted from PTAR is not as durable as the NPRM supposes. Neither is the continued success of network-quality first-run syndicated programming. The maintenance (or expansion) of the current level of independent television stations (and the potential for the emergence of new networks dependent on currently independent stations as affiliates), as well as of the current volume (and quality) of first-run syndicated programming, requires the continuation of PTAR in its present form.

4/ The NPRM is flatly wrong in asserting that alternative delivery channels (cable, MMDS, DBS) are meaningful substitutes for broadcast television. See n.14, supra.

I. THE PRIME TIME ACCESS RULE HAS SUBSTANTIALLY ACHIEVED THE OBJECTIVES FOR WHICH IT WAS INTENDED.

The Commission had one primary concern when it adopted PTAR. The networks had an effective monopoly on the supply of prime time programming. Network-affiliated stations were the dominant, and in many instances the sole, source of video programming in their markets and, whether by choice or through the dominion of their network masters, these stations dedicated the prime time viewing hours almost entirely to network fare. This unhealthy homogeneity deprived viewers of access to a diverse array of programs that the Commission, correctly in our view, thought to be in the public interest.

In fashioning PTAR, the Commission sought to counter-balance this state of affairs with an elegant solution that, with minimal intrusion on the editorial sovereignty of network affiliates,[5/] created both a window of opportunity for non-network programs to seek audience acceptance and a spur to the viability of non-affiliated television stations.[6/] Although these two rewards of PTAR are sometimes characterized

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5/ Indeed, there is a very real sense, as recognized in the NPRM, that PTAR did not retard but in fact advanced the range of choices available to network affiliates. If it is right that the affiliates did not "choose"--in any meaningful sense of that term--to air network programs during prime time but had that "choice" imposed on them, PTAR has created an environment permitting each affiliate to exercise its own programming judgment. Although that freedom is curtailed both by the brevity of the time period to which the rule applies and by the elimination of one of the programming sources (that is, its network) on which the affiliate can draw in exercising its judgment, each affiliate can select from a wide array of first-run syndicated programs or can opt to fill this period with programming that it produces itself. NPRM, 9 F.C.C. Rcd. at 6336.

6/ As we develop at greater length below, the rule has had the additional salutary effect of fostering an environment hospitable to a creation of additional networks, a still further accelerant to the spread of diverse sources of programming.

separately as "source" and "outlet" diversity, they have the common theme of affording television viewers with a greater range of programming choices.[7]

A. **The Rule Has Had a Profoundly Important Beneficial Effect Upon Independent Television Stations.**

The Commission theorized, in shaping PTAR, that independent television stations would be made more viable competitors with network affiliates, with a number of attendant beneficial effects. The NPRM summarizes this point in the following terms:

> *Third*, the rule has come to be viewed as a mechanism for strengthening independent stations, with the result of increasing the strength and number of the primary buyers of independently produced programming. The argument is that, with this increase, not only are the number of independent program producers increasing, but the opportunity for new networks to emerge and compete with the existing networks is enhanced (by the presence of a healthy pool of independent stations). Thus, by strengthening independent stations overall, the rule has been considered to further both diversity and competition goals. Moreover, the independent stations themselves produce some degree of original programming, which contributes to the overall levels of diverse programming available in the market.

NPRM, 9 F.C.C. Rcd. at 6348.

The linchpin to this wheel of benefits is the extent to which PTAR has had the effect of "strengthening independent stations...." This is an issue subject to empirical examination, which has now been performed. The Economic Report filed for the

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[7] King World has not forgotten that PTAR was adopted to further the public interest. Independent television stations, program producers and syndicators are collateral beneficiaries of the rule only to the extent that the programming they supply is able to earn public acceptance. To the extent that the NPRM expresses concern with curtailment of the liberty of networks to maximize their economic welfare, the core purposes of PTAR are slighted.

Association of Independent Television Stations, Inc., King World and Viacom Inc. establishes, through econometric analysis, that implementation of the rule had an early and dramatic beneficial effect on viewer acceptance of independent stations not just in the access period[8/] but also in the prime time hour next following it. As the Economic Report illustrates, the implementation of PTAR resulted in an increase in ratings during these time periods for independent stations in the top thirty markets of 2.83 rating points. Economic Report at 53, Table IV.2. Although intervening changes in the markets have attenuated the influence of PTAR somewhat, in 1993 (the last year for which the data relied on in the Economic Report were available), the rule accounted for a 2.4 point increase in ratings during these time periods in that year. Id.

Given that PTAR has worked so well, it should be no surprise that repeal or substantial revision of the rule would hurt the ratings performance of independent stations. The Economic Report projects that repeal of PTAR would result in an average ratings decrease during the access period of almost 60 percent (from 4.01 points to 1.67 points). Economic Report at 47-48. If one looks at the broader effect of PTAR on lead-out programming (the programs in the prime time hour following the 7:30-8:00 p.m. (Eastern or Pacific Time) interval), a repeal of the rule would prove more injurious still to independent stations. Average ratings in the 7:30 - 9:00 p.m. period would fall by

8/ The networks had not, even before implementation of the rule, generally programmed the first half hour of what PTAR defines as prime time; after the rule was in place, the networks determined not to program the second half hour of regulatory prime time. Most network affiliates have chosen to use the first hour of prime time to fulfill their PTAR obligations. The second half-hour of this period is often informally thought of as the "access period" because some network affiliates show network news programs exempted from the rule under 47 C.F.R. § 73.658(c)(3) during the first half hour.

slightly more than 67 percent (from 4.15 to 1.35). Id. A corollary to these findings concludes that PTAR was instrumental in spurring the growth of independent stations that has occurred since implementation of PTAR. See Economic Report at 52-57; NPRM, 9 F.C.C.Rcd. at 6337. It ought not then be surprising that the econometric study shows that the consequence of such a collapse in ratings would result in the failure of many independent stations. Id. at 54-57.

B. The Rule Has Also Had Its Intended Effect on the Introduction of Non-Network Programming in Prime Time.

It was axiomatic that PTAR would serve the Commission's desire to increase the diversity of program choices available to viewers by excluding network and off-network programming from the access interval in the top 50 markets. The practical effect of the adoption of PTAR was more beneficial still. The networks, recognizing that it was not commercially viable to distribute access interval programming that could be carried only by stations in markets below the top 50, reacted to PTAR by declining to distribute any programming at all in the first hour of prime time. This has also resulted in an enhancement of programming diversity in markets below the top 50. Many network affiliates in the markets below market 50 decided, in the absence of the network feed during the second half hour of prime time, to show first-run programs rather than off-network programs, which they are eligible to carry.

Walt Disney Studios[9/] has sought (incorrectly, as we will show) to use the fact that first-run syndicated programs occupy 52 percent of the half hours programmed by network affiliates in markets 51-100 during weekdays from 7 to 8 p.m. to argue that the off-network proscription of PTAR is unnecessary. The Disney argument is that, if stations that are not bound by the off-network prohibition choose in substantial numbers to air first-run programming in prime time when they have the choice (because of the inapplicability of the rule to them) of selecting off-network material, affiliates in the top 50 markets will act comparably. This argument is wrong in its assumptions. Even were those assumptions accurate, they mistake the way in which programming choices in markets 51-100 are made.

The Disney paper assumes that, if the off-network provisions of PTAR were repealed, network-affiliated stations in the top 50 markets will clear first-run syndicated programming in approximately the same proportion as network affiliates in the second 50 markets do today. We demonstrate below that this assumption is wrong. Even were the assumption correct, it would not support the conclusion advanced by the Disney paper that the off-network program prohibition of PTAR therefore is unnecessary. King World has repeatedly made the point--and we offer more evidence to support the conclusion below--that it is imperative to the success of network-quality first-run syndicated programming that such programming be cleared on dominant stations in the top markets. Attachment 1 to this pleading, which examines in more detail than is

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9/ Walt Disney Studios, <u>PTAR Top 50 Market Access Position Paper</u>, April, 1994.

presented in the Disney paper the clearance of first-run syndicated programming by network affiliates in the second 50 markets, shows that first-run syndicated program clearance by network affiliates in markets 51-100 is roughly linear.[10/] Comparable clearances across the top 50 markets would simply not accomplish the audience penetration necessary to the success of network-quality first-run syndicated programming.

More tellingly, the Disney paper's assumption that the program choices made by stations in the second 50 markets as a group are good predictors of the choices that would be made in the top 50 markets in the absence of PTAR cannot be defended. As the Economic Report (at pages 59-63) illustrates, the programming choices made by stations in the first and second 50 markets are not at all independent, contrary to the assumption of the Disney analysis. Instead, clearance in the top 50 markets is a prerequisite to clearance in the second 50 markets. The absence of the off-network provision of PTAR would result in a very different array of program selection in the first 50 markets with consequent decrements in the clearance of first-run programming in the second 50 markets. Indeed, as we show in what follows, the likelihood of success of all but the most established quality first-run programming would likely be significantly diminished (as it had been before the implementation of PTAR) if the off-network restrictions were eliminated from PTAR.

10/ For example, just over 35 percent of the off-network programs televised during the first hour of prime time in markets 51-100 (17 of 48 half hours) were shown in markets 51-70, the top 40 percent of these markets.

Off-network programming newly introduced to syndication carries with it a built-in audience demand. Newly developed first-run programming, by contrast, must wholly create audience acceptance from the ground up, on a market-by-market basis. As a general rule, national advertisers require that programming be accessible by at least 70 percent of U.S. television households to qualify as vehicles for their advertising. Such an audience cannot be achieved by a newly-launched first-run syndicated series unless it has clearance on the dominant stations-- which are almost always the network-owned and network-affiliated stations--in many, if not all, of the top 50 markets. The success of most first-run programming is, in turn, greatly dependent upon its ability to attract national advertising. Moreover, access to audience at sufficient levels during the peak (prime time) viewing hours remains crucial to the overall viability of the first-run syndication sector because the programs successfully launched in the access period are the economic foundation for the development of all first-run syndicated programming.

At least one participant in this proceeding has, in an earlier phase, admitted that modification of PTAR to permit off-network programming to be broadcast by affiliates during prime time access will result in a "redistribution of off-network and first-run programming between affiliates and independent stations and between access scheduling and scheduling in other day parts." CBS Comments at 73. The unstated premise is that such "redistribution" will entail some movement of first-run syndicated programming from network affiliates to independent stations and some corresponding movement of off-network programming from independent stations to network affiliates.

It is certainly the case that off-network programs will move from independent stations in many of the top 50 markets to network-affiliated stations. The

Economic Report establishes that this movement will occur even if the networks exercise no pressure in favor of such a result. Even if off-network programs draw smaller audiences than the most popular first-run offerings, they can, from a station's perspective, be more profitable (and considerably less risky) than first-run shows. Economic Report at 63-70. As the Economic Report trenchantly observes (at page 65) it is profit maximization, not audience maximization, that motivates stations' programming choices. Thus, the best outcome--in terms of maximizing viewer programming choice--that can result from elimination of the off-network provision of PTAR is that first-run syndicated programs targeted for prime time access would be heavily, if not wholly, dependent upon truly independent stations (that is, stations not affiliated with either the three primary networks or the so-called "emerging" networks)[11/] for access to audience. Deprived of access to top-50 market network-affiliated stations, fewer of such programs will survive.

Data compiled by the FCC's Office of Plans and Policy confirms that independent stations in the top 50 markets simply cannot supply access to audience during the access period of the size required to provide a reasonable likelihood of success for first-run syndicated programming. Broadcast Television in a Multichannel Marketplace, 6 F.C.C. Rcd. 3996, 4019-20. The decline in the existing strength of independent stations resulting from repeal of PTAR would only worsen matters (Economic Report at 47-52). "Redistribution" would, in fact, diminish the ability of

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11/ There is evidence that Fox affiliates are being "persuaded" by that new network to run Fox programs throughout all four hours of prime time.

producers and syndicators of first-run programming to gain access to the audiences during the crucial period upon which the health of the first-run programming industry indispensably depends.

Accordingly, the changes in the television marketplace that have occurred in the past 20 years provide absolutely no support for the proposition that the off-network restriction of PTAR serves no purpose in the current marketplace. Neither the economic infrastructure of first-run programming nor the relative strength of network-owned and -affiliated stations in their respective markets has changed in any way.

Attachment 2 to this pleading sets out the rating and share performance of "Big 3" affiliates, Fox affiliates and independent stations in each of the top 50 markets.[12/] As indicated by that document, although the performance of the independent stations in the two largest markets (New York and Los Angeles) approaches the performance of the network affiliates in those markets, any semblance of parity quickly fades as smaller markets are examined. Indeed, even by market 3 (Chicago), the average performance of the independents (including, for these purposes, a Fox affiliate) is less than half of that of the network affiliates in that market. One cannot say with certainty from this demonstration how independent stations would perform during the access period if they were programmed with successful first-run syndicated programs now appearing primarily

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12/ As that document shows, the numbers used are averages of the November 1993, February 1994 and May 1994 sweeps. The performance of independents is very considerably understated because the independent stations in any market that fell below Nielsen reporting standards were not included in the averaging. Were those stations counted into the divisor by which the sum of ratings and shares are divided, the dividend would be dramatically smaller for the independent stations' averages.

on network affiliates. It does strongly suggest, however, that newly-launched first-run syndicated programs would have a very difficult time achieving the ratings that they must (and now sometimes do, on network affiliates) achieve in order to become commercially viable. Such new offerings would have a double burden:[13/] These programs begin with a disadvantage of having to build audience from a base of zero; on the independents, they would also have to overcome the consistently lower audience levels of the stations themselves.

There is additional evidence that "redistribution" would imperil the chances of success of first-run syndicated programs. The Economic Report shows that, even in an environment with PTAR, which enhances the ability of first-run syndicated programs to obtain clearances on network affiliates, off-network and first-run syndicated programs tend to achieve approximately the same nationwide audience ratings in prime time access. Economic Report at 83-84, 85. As the Economic Report theorizes, and history bears out, successful prime time access first-run syndicated programs require ratings substantially higher than those achieved by off-network shows to remain viable. See Economic Report at 81-85; attachment 3 to this pleading. This strongly suggests that the prospects of success for a typical first-run syndicated program cleared primarily on independent stations will be significantly bleaker in the absence of PTAR.[14/]

13/ It may be that some well-established first-run syndicated programs (such as "Wheel of Fortune" and "Jeopardy!") will survive on network affiliates in prime time. That is not the point. New programs will suffer the nearly insuperable obstacles to success recited in the text.

14/ We have discussed only the "redistribution" of off-net and first-run syndicated programs among affiliated and independent broadcasters. It follows, *a fortiori*, from this analysis that any attempt

Footnote continued on next page

If first-run syndicated programs cannot succeed in prime time in the top 50 markets without PTAR (including its off-network provision), they will not survive in prime time nationwide and, likely, will not survive at all. The truth of the first assertion is demonstrated by the steps that the networks took when deprived of the opportunity to clear network programs during one hour daily of prime time with the advent of PTAR. As we earlier noted, the network response to this prohibition was to cease programming this hour in any market. Given the economics that the network behavior suggests, first-run syndicated programming, without the preferential access to the top 50 markets afforded by PTAR, would fair no better. The current economic structure of first-run syndication requires the audience reach available only in prime time and, as we have demonstrated, the level of prime time audiences reached only by network-affiliated stations. King World does not suggest that it would recede entirely from the first-run syndication market if ousted from prime time access or from the larger audiences available through clearance by major market network affiliates; however, overall viewer choice would diminish.[15/]

Footnote continued from previous page

to "redistribute" first-run programs to other modes of delivery (cable, MMDS, DBS) that have even lower per channel audiences, would fail. See, Economic Report at 30-31.

15/ As we discuss in the following section, the benefits spawned by the competition by King World and other first-run syndicators with the networks for prime time national advertising revenues would also be lost. See, Economic Report at 25-30.

II. THE PRIME TIME ACCESS RULE PROVIDES INCIDENTAL BENEFITS THAT SHOULD NOT BE SACRIFICED.

Although the enhancement of viewer choice is the most important gauge of the success of PTAR, it is not the only benefit resulting from the rule. PTAR has had the collateral consequence of introducing competition with the networks in the market for national advertising, resulting in a curb on the networks' power in that market.

As the Economic Report illustrates, there has been an apparent paradox in the market for national advertising over television in recent years. Despite a decrease in the networks' share of audience, the national advertising rates exacted by the networks have increased. Economic Report at 21-25. In a properly functioning market, this would not occur. Its occurrence signals something fundamentally amiss in the market for national television advertising: that the networks possess oligopoly power in this arena.

PTAR has had the effect of ameliorating this market dysfunction. As the Economic Report demonstrates, the presence of Fox and the newly-launched United Paramount and Warner Brothers networking arrangements, as well as the evolving presence of firms such King World, serve as important, if not yet mature, constraints on the ability of the networks to abuse their power in the national television advertising market. This serves the interests of the public in ways that are not purely academic. Cynics might view trades between rich advertisers and rich networks as unimportant to the public. But this is not so. Advertisers do not, ultimately, bear the cost of advertising. Every penny that is spent on national television advertising is recouped from sales of the bars of soap, boxes of cereal and bottles of beer that each of us consumes. Constraining improperly high national television advertising prices has direct consequences for the

American consumer. PTAR, by encouraging the viability of programming from non-network sources, has helped to impose a ceiling on the networks' ability to increase national advertising prices in the face of diminishing audiences.

There is a second, and not insignificant, economic benefit that has resulted from PTAR. The market for local advertising has been expanded by PTAR. Virtually all of the advertising time sold on and adjacent to network programs is national. The power of the established networks is diminished by competition for national advertising time sales from emerging networks and first-run syndicators, in and adjacent to whose programs local stations are afforded numerous advertising availabilities. In this way PTAR, which makes this competition possible, has also opened up prime time advertising spots for local advertisers. This, as the Economic Report demonstrates, has benefited the market for local advertising as well. Id. at 85-88.

Yet one more ancillary benefit of PTAR is its contribution to the emergence of new networks. As the NPRM recognizes, the proliferation of competitive networks depends "... on the availability of numbers and economic strength of affiliated stations to form a base for [their] launch ...." 9 F.C.C.Rcd. at 6356. The Economic Report quantifies some aspects of this fact. By definition, new networks cannot develop unless there are viable non-affiliated stations to serve as outlets for their programming. Precisely because PTAR has been instrumentally important in spurring the proliferation and vitality of independent television stations, the rule has served as a spring board for the development of new networks. The influence of PTAR in the development of emerging networks is more complex than this, however. As the development of the Fox, UPN and WB networks attests, networks must develop incrementally. A critical audience mass for programs that will serve as the anchors for the new networks is an imperative to their success. PTAR permits emerging networks to build such an audience in three distinct ways: As we have already noted, the rule has had a beneficial influence on the creation of independent stations. PTAR also has had the effect of increasing the number of viewers of independent stations during the period immediately following the access interval, an indispensable help to the development of audience for what might become anchor programming for new networks. See Economic Report at 88-95. Lastly, the rule permits an emerging network programmer to take advantage of the power of network affiliates in the top 50 markets to develop audience by placing its programs on those stations to develop a following for programs that can then be moved to independent stations from which a network can develop. In all of these ways, PTAR unquestionably enhances the development of emerging networks.

III. THE COSTS OF PTAR ARE VERY SMALL IN COMPARISON WITH ITS BENEFITS.

Measurement of the costs and benefits of PTAR must begin with an understanding of the nature of the market being regulated. As the Economic Report (at pp. 7-8) points out, the NPRM fundamentally miscomprehends a very important aspect of the television broadcasting market. Television broadcasting has all the *indicia* of a public good; programs can be viewed-- "consumed" --by an infinite number of people without impairing the enjoyment of, or increasing the cost to, the next viewer. From a regulatory vantage, this means that conventional market mechanisms will not work to maximize consumer welfare. Regulation is imperative in such circumstances if consumer interests are to be well served. One cannot indulge the normally correct supposition that all regulation exacts costs in an environment such as this. Rather, one must examine which, among all available regulations, most effectively allocates the public good.

PTAR is a remarkably efficient market regulator. As we noted earlier,[16/] the operation of the rule, viewed from a long-term perspective, imposes no net social cost; instead, the benefits to the public outweigh the small restriction on the freedom of editorial choice perceived by network affiliates subject to the rule. The rule does impose burdens on the networks, but these are small. There are twenty-eight prime time hours in a broadcast week; PTAR deprives the networks of control over no more than seven of these.[17/] Even if one were to conclude that there were some additional economic exaction from the networks by the limits imposed on top-50 market affiliate clearance of off-net programming during prime time, adjustment to other of the Commission's rules could attenuate the sting of this.[18/] Given the broad public benefits that PTAR has accomplished, this is a very small price indeed.

16/ See n.5, above.

17/ In some markets, network news is carried by virtue of the PTAR exemption for such programming in 47 C.F.R. § 73.658(k)(3), reducing the effective PTAR window for first-run syndicated programming on weekdays to two and one-half weekday hours. On weekends, the two hours of prime time theoretically freed for non-network programs are, at least occasionally, also occupied by network programs through other exemptions. See 47 C.F.R. § 73.658(k)(1), (4) & (6). It is interesting to note that the networks have apparently disclaimed any immediate intention to program the access period with on-network offerings. See Broadcasting & Cable, March 6, 1995, at 81.

18/ King World does not believe that it will prove appropriate to "sunset" the remaining elements of the financial interest and syndication rules and intends no more, by this observation, than to recognize the possibility of that outcome. If the remaining Fin-Syn rules are in fact retained, they will have been adequately justified on a cost-benefit basis on their own terms and ought not to be "counted twice" by inclusion in the analysis of PTAR as an additional detriment to the networks.

There is a very real sense in which it is fallacious to think of PTAR as an intrusion on the rights of the networks at all. Broadcast television is, as we have pointed out, a public good that has been subject to regulation since its inception. Those who participate in the supply of such goods must expect some restraints. They are entitled to little, if any, sympathy when the FCC determines that the broader interest of the public requires some minimal limitation on the way in which they conduct their business, if the interests of the public are best served by those limitations.

IV. CONCLUSION

PTAR was adopted by the Commission as a necessary constraint on the oligopoly that the networks maintained over the supply of prime time programming in 1970. The rule has worked; first-run syndicated programming now offers viewers an immense array of programming choices that was unavailable previously. The econometric evidence supplied by the Economic Report establishes just how profoundly important PTAR has been in helping to multiply the number of independent television stations. And, as independent outlets have multiplied, the development of new networks has become feasible, lending a further benefit to the range of alternative video programming available to the public. These direct benefits of the rule are augmented by the extent to which the networks' abuse of power in advertising markets has been constrained by competition provided by syndicators and emerging networks in the market for national video advertising time. The market for local advertising has benefited from the rule as well.

All of this has been accomplished at remarkably little cost. A public good, such as broadcast television, requires regulation in order to optimize supply. PTAR serves that function while imposing very small burdens on the networks and yielding substantial public benefits.

PTAR serves the interests of the public and should not be repealed or amended.

Respectfully submitted,

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ATTACHMENT 1